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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 353

MILK WAGON DRIVERS UNION OF CHICAGO, LOCAL 753, A VOLUNTARY UNINCORPORATED ASSOCIATION; ROBERT G. FITCHIE, JAMES KENNEDY, STEVE SUMNER, FRED O. DAHMS, F. RAY BRYANT, ALBERT O. RICHARDS, JOSEPH L. PATTERSON AND DAVID RISKIND,

Petitioners;

vs.

MEADOWMOOR DAIRIES, INC., A CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

PETITION BY PETITIONERS FOR RECONSIDERATION OF ORDER OF OCTOBER 23, 1939 DENYING PETITION FOR WRIT OF CERTIORARI, AND FOR A REHEARING.

JOSEPH A. PADWAY,
Counsel for Petitioners.

DAVID A. RISKIND,
ABRAHAM W. BRUSSELL,
Of Counsel.

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To Honorable Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Come now the above named petitioners and present this petition for a reconsideration of the order of Octo-

ber 23, 1939 denying petitioners' petition for a writ of certiorari to the Supreme Court of Illinois, and they respectfully pray this Honorable Court to vacate its order of October 23, 1939 denying the petition for writ of certiorari previously filed and to grant a rehearing. For grounds of this petition for reconsideration and rehearing petitioners respectfully state:

1.

Jurisdiction.

The petition for certiorari was filed September 2, 1939. It was denied on October 23, 1939. This petition is filed within twenty-five days (Rule 33, Rules of the Supreme Court of the United States).

2.

Questions presented by the petition for a writ of certiorari and respondent's brief in opposition.

Under the Petition for Writ of Certiorari and Respondent's Brief in Opposition Thereto two classes of questions were presented: first, procedural questions, *i. e.*, was the Federal question properly presented and preserved for review by this court

See our Petition: pp. 15-20,
See Respondent's Brief: pp. 11-18,

second, the merits, *i. e.*, was the Federal question one of such substance and importance that this court should grant certiorari.

See our Petition: pp. 9-11, 22-34,
See Respondent's Brief: pp. 18-24.

Petitioners admit that they do not know the ground or grounds upon which this court denied the petition for certiorari. They respectfully apply for a reconsideration of the order denying certiorari because they earnestly believe that first, the original petition AND second, developments subsequent to the filing of both briefs in this court conclusively show that the decision of the Illinois Supreme Court which they here seek to review denies petitioners' their rights to free speech under the due process clause of the 14th Amendment to the United States Constitution. By these subsequent developments we refer to the following decisions of Illinois Courts:

Swing v. *American Federation of Labor, et al.*, 372 Ill. 91; 22 N. E. 2d 857 (petition rehearing denied Oct. 13, 1939, reported in N. E. 2d advance sheets of Nov. 1, 1939).

Maywood Farms Company v. *Milk Wagon Drivers' Union of Chicago, Local 753, et al.* (decided Oct. 16, 1939 with supplemental opinion Oct. 27, 1939; not officially published; abstract opinion in 22 N. E. 2d 962; N. E. 2d advance sheets of Nov. 8, 1939. Set out as Appendix A to this Petition for Rehearing omitting irrelevant matter contained in supplemental opinion).

and

Hendrickson Motor Truck Co., et al. v. *International Association of Machinists, Automobile Mechanics, Local 701, et al.* (decided Oct. 16, 1939, not officially published; abstract opinion in 22 N. E. 2d 969; N. E. 2d advance sheets of Nov. 8, 1939; opinion set out as Appendix B to this Petition for Rehearing).

We respectfully contend that a reading of the opinions in the three foregoing decisions in connection with the

arguments advanced in our petition and as resisted in Respondent's Brief in opposition to our petition demonstrates conclusively that the Illinois courts of today have by judicial declaration (1) rendered "peaceful picketing" unlawful *per se* even in the absence of any violence where a relationship of employer and employee does not exist between the person "picketed" and the union so "picketing", (2) and that such judicial declaration has deprived petitioners of their constitutional rights under the due process clause of the 14th Amendment to the Federal Constitution because it prevents them as union members from carrying a banner or placard on the public highways as a means of communicating information to the public—they can't use a banner as a means of free speech.

These three Illinois opinions illustrate that the cynical French idiom *"Plus ça change, plus c'est la même chose"* has trenchant application to "Judicial Interpretation of Labor Laws".

Fraenkel: 6 U. of Chicago Law Review, 576-606, at 578, (1939).

III.

Violence and Constitutional Rights to "Peaceful Picketing."

In Respondent's Brief opposing our Petition for a Writ of Certiorari the factor of *violence* is given the *strongest* emphasis.

See Respondent's Brief at pp. 2, 3, 4, 5, 6 [referring to *56* instances in the record] 23 and 24.

The most reasonable inference to be drawn from this court's denial of our petition for certiorari is that the

existence of acts of "violence" has in some way impaired the constitutional rights of petitioners to peaceful picketing conducted *without* violence *even in the future!*

If the decision of the Illinois Supreme Court and this court rest on "violence" that would be one thing. But it should be specifically so stated in order to avoid error in depriving men of their rights under the Federal Constitution.

But the decisions of the Illinois Supreme and the Illinois Appellate Court interpret the decision here sought to be reviewed as *not* resting upon VIOLENCE—and these decisions clearly demonstrate that the constitutional rights of the petitioners have been submerged in a "label bath" that—as far as the *Illinois* courts are concerned—effectively disguises their constitutional nature.

In *Swing* v. *American Federation of Labor*, 372 Ill. 91, the Illinois Supreme Court was divided: Justices Stone and Jones concurred in result, and Justice Farthing dissented (as he did in the instant case R. 473) but he filed a vigorous dissenting opinion, where, *inter alia*, he designated the reasoning of the majority as "**sophistry**" (372 Ill. at 101).

Justice Shaw recognizes that in the *Meadowmoor* case (the case at bar, 371 Ill. 377, R. 458):

> ". . . we pointed out that *all constitutional rights* are co-equal and must be harmonized with *each other*, no one such right being permitted to override or submerge another." (Italics ours.)
>
> (372 Ill. at 96.)

In this *Swing* case Justice Shaw in substance said that peaceful picketing by carrying a banner was "unlawful" because it was a "libel". In the cause now before this

court Justice Gunn held that such peaceful picketing was unlawful because it was another kind of a tort, *i. e.*, an interference with the advantageous relationships possessed by the respondent Meadowmoor Dairy.

This is NOT a decision based on *violence.*

This "disguised" error is forcefully pointed out by dissenting Justice Farthing in *Swing* v. *American Federation of Labor,* 372 Ill. 92 where he states:

> "Contrary to the intimation in the majority opinion, this case does not involve the question of restraining violence. Appellants admit that an injunction against violence is proper. The sole issue is whether the circuit court erred in enjoining peaceful picketing. The fact that violence has occurred along with picketing is no reason for enjoining further peaceful picketing."
>
> 372 Ill. at 97.

And consider the interpretation placed by the Appellate Court of Illinois in the case of *Hendrickson Motor Truck Co.* v. *International Association of Machinists, etc.,* as set out in Appendix B where at Appendix p. vi Justice O'Connor says as influenced by the opinion of the Illinois Supreme Court in the case at bar—

> "Prior to the enactment of this statute *peaceful picketing was unlawful* (citing cases)." (Italics ours.)

According to Justice O'Connor the Illinois law *today* is that "peaceful picketing"—except by an employee against *his* employer—is an unlawful act.

What has happened in Illinois to the right under the due process clause of the 14th Amendment to the Federal Constitution to disseminate information to the public by

the means of an individual carrying a placard on the public highway? Answer: It has been destroyed by Judical pronouncement.

What is the result to the petitioners of their loss of their constitutional rights? The effect is not abstract or academic. In the case at bar the Meadowmoor Dairy continues its non-union business. The underpaid and overworked vendors will inevitably replace union men.

Other dairies follow suit. In the case of *Maywood Farms v. Milk Wagon Driver's Union,* as reported in Appendix A, the Maywood Farms Dairy will not employ members of the petitioner union because it can get men for less money.

The petitioner union and its members face this non-union competition without opportunity for making the facts known to the public. The Illinois equity injunction says: You may not choose the sole efficacious method of informing the public—that right to "free speech" is gone.

We submit that the Illinois Courts have refused to consider the statement by Justice Brandeis, speaking for this Court, where he said:

> "Members of a union might, without special statutory authorization by a state make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."
>
> *Senn* v. *Tile Layer's Union,* 301 U. S. at 478.

But the Illinois Courts have stated the law to be just to the contrary: in the absence of the Illinois Anti-Injunction Act peaceful picketing was (is) unlawful!

The decision by the Illinois *Appellate* Court in *Swing* v. *American Federation of Labor,* 298 Ill. App. 63, 18 N. E. (2d) 258 (1938) was sharply criticized in

33 Ill. Law Review 722 (1939).

A recent discussion of *People* v. *Harris*, 91 Pac. (2d) 989 (Colorado Supreme Ct. May 29, 1939) cited and relied on in our Petition for Certiorari at pp. 10, 28 is found in

4 Rocky Mountain Law Review, 254-258 (1939).

The writer reviews the recent decisions on "freedom of speech", and quotes with approval and cites from *Senn* v. *Tile Layer's Union*, 301 U. S. 468 (1937).

It is our belief that the presence of "violence" strongly influenced this Court in denying certiorari. We do not justify the violence. We acquiesced in the action of the Chancellor in enjoining violence (R. 360-361) in the past and in the future. But how can a court "punish" an individual by depriving him of his "future" constitutional right to "free speech"?

See dissent of Justice Farthing in *Swing* v. *American Federation of Labor*, 372 Ill. at p. 97.

It is respectfully suggested that the presence of violence should not conclusively deter this Court from fully reviewing the decision of the Illinois Supreme Court.

And if the denial of certiorari is based upon the existence of *violence* this Court should so specifically designate in order to avoid errors by other Courts in attempting to follow the decision of the Illinois Supreme Court in cases where *no* violence is shown.

Express harmonization of the decisions cited by us at pp. 32-34 is highly desirable.

In a cause entitled *Thornhill* v. *State of Alabama*, pending in this court on petition for certiorari (docket No. —unknown at present) there is presented one aspect of the question of "peaceful picketing" as guaranteed by the due process clause of the 14th Amendment to the Fed-

eral Constitution. We respectfully urge that the decision of the Illinois Supreme Court as construed and applied by later Illinois decisions presents additional "aspects" to this question of "peaceful picketing" as guaranteed by "free speech" under the Federal Constitution. This Court should render a decision that will definitely clear up this entire problem.

A delay in determination of this question of law by the highest court of the land tends to the destruction of the petitioner union and loss of jobs by its members; vendors replace union members in the distribution of milk in the City of Chicago and the union is helpless because the Illinois Courts now say to the union "You may not inform the public by means of a banner carried on the public highway."

PRAYER.

Wherefore petitioners respectfully pray that this Honorable Court reconsider its order of Oct. 23, 1939 denying petition for writ of certiorari herein and a rehearing granted to the end that such order be vacated and the petition for certiorari be allowed.

Respectfully submitted,

JOSEPH A. PADWAY,
Counsel for Petitioners.

DAVID A. RISKIND,
ABRAHAM W. BRUSSELL,
Of Counsel.

CERTIFICATE OF COUNSEL.

I, Abraham W. Brussell, one of the attorneys for the above named petitioners, do hereby certify that the foregoing petition for a rehearing on the order of October 23, 1939, denying certiorari in this cause is presented in good faith and not for delay.

ABRAHAM W. BRUSSELL,
One of the Attorneys for Petitioners.

APPENDIX A

40296

MAYWOOD FARMS COMPANY, a Corporation,
Appellant,

vs.

MILK WAGON DRIVERS UNION OF CHICAGO, LOCAL 753, a voluntary unincorporated association, ROBERT G. FITCHIE, JAMES KENNEDY, STEVE C. SUMNER, FRED C. DAHMS, F. RAY BRYANT, ALBERT C. RICHARDS, JOSEPH L. PATTERSON and DAVID A. RISKIND,
Appellees.

Appeal from Superior Court of Cook County.

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed its complaint seeking to have defendants enjoined from picketing the stores of its customers; the master in chancery, after hearing evidence, recommended dismissal of the complaint; exceptions were overruled, the court entered a decree dismissing the complaint, and plaintiff appeals.

The complaint alleged and the master found that plaintiff is a corporation with its principal office in Maywood, Cook county, and engaged in Chicago and surrounding suburbs in distributing, pasteurizing and bottling milk and dairy products and selling them in Chicago and suburbs; that it purchases large quantities of milk from farmers and out-of-town plants and carries it in its own trucks to its plant in Maywood where it is pasteurized and bottled and made ready for distribution. Its products are delivered by plaintiff's trucks to certain stores, to be resold to the customers of such stores. Plaintiff also sells to independent contractors or vendors, who buy plaintiff's products and

pay for them at the plant of plaintiff. The master found that by this means plaintiff sells its product at a price less than that established by other dairies in the Chicago area doing business on a house to house basis. The complaint alleged that all of plaintiff's employees were active, paying members of a union called the Chicago Milk Vendors, Drivers and Dairy Workers Union. Its members are not members of defendant union.

There is no dispute or difference of any character or kind between plaintiff and any of its employees regarding sales arrangements, wages or working conditions. Defendant Union hired pickets for the specific purpose of picketing the stores of customers of plaintiff. The pickets patrolled back and forth in front of these stores, carrying a placard or banner having inscribed thereon the words, "This store is unfair to Milk Wagon Drivers' Union, Local 753, affiliated with American Federation of Labor." The picketed stores have no connection with defendant union. The master found that the pickets spoke to drivers making deliveries of other commodities to these stores, and as a consequence deliveries of other commodities were refused to these storekeepers. By reason of this picketing plaintiff is in danger of losing the business of these stores.

The recommendation of the master, followed by the chancellor, was that our Anti-Injunction act of 1925 (Ill. Rev. Stats. 1937, chap. 48, par. 2a) prohibits enjoining picketing in a case of this kind, relying on *Fenske Bros* v. *Upholsterers Union,* 358 Ill. 239, and *Schuster* v. *International Assoc. of Machinists,* 293 Ill. App. 177. Without discussing these cases, it is sufficient to say that subsequent to those opinions, it has been held by two later opinions by our Supreme court that an injunction will issue to prevent picketing where there is no dispute between the employer and the employee. *Meadowmoor Dairies* v. *Drivers' Union,* 371 Ill. 377; *Swing* v. *American Federation of Labor,*

Docket No. 25083, opinion filed in April, 1939. It follows, from a consideration of the opinions in these cases, that plaintiff was entitled to an injunction as there was no dispute between it and its employees.

A further reason for the issuance of an injunction in this case is found in the opinion in the *Meadowmoor* case, which holds that it is illegal to persuade or coerce persons dealing with one in business into discontinuing such dealings by means commonly called a secondary boycott. The opinion in that case held that picketing the customers and thus destroying the seller's business would tend to prevent competition and foster monopoly, and that "There is nothing in the Anti-Injunction statute that prohibits the issuing of an injunction to restrain boycotting or interfering with contract relations, other than employment contracts, or the right to do business generally . . . "

The master's fees are questioned. When the report was filed the master asked for the allowance of $1986.55 as his fees; plaintiff filed a written motion objecting and asking that the statutory fees be allowed; without any recital of facts the chancellor reduced the fees to $1500 and denied plaintiff's motion to reduce the fees to the amount allowed by the statute. Chap. 90, par. 9, Ill. Rev. Stats. 1937, provides that masters in chancery shall receive for their services such compensation as shall be allowed by law; and chapter 53, par. 38, provides for fees of a master in chancery. Upon the remandment of this case the chancellor should revise the allowance for the master's fees, following the statutory provisions.

The decree dismissing the complaint is reversed and the cause is remanded with directions to enter a restraining order in accordance with the prayer of the complaint, and that the fees of the master be recast.

REVERSED AND REMANDED WITH DIRECTIONS.

MATCHETT, P. J., AND O'CONNOR, J., CONCUR.

APPENDIX B

40642

HENDRICKSON MOTOR TRUCK CO., a Corporation, *et al.*,
Appellees,

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS, AUTOMOBILE MECHANICS LOCAL 701, a Voluntary Association, *et al.*,
Appellants.

Appeal from Interlocutory Injunction of December 27, 1938.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Hendrickson Motor Truck Company, a corporation, was engaged "in the business of manufacturing, selling, repairing, reconditioning and servicing motor trucks and motor truck parts and appliances" at its place of business, 3538 South Wabash avenue, Chicago. It filed its verified bill against two unions and some of their officials to restrain them from picketing plaintiff's business and from exhibiting any sign or placard characterizing plaintiff or its place of business as being non-union or unfair to organized labor for refusing to permit collective bargaining; from carrying on a secondary boycott; from physically obstructing or interfering with plaintiff's business or its employees, etc. Defendants filed their verified answer in which they averred that they attempted to unionize various employees in Cook county who were engaged in the craft or trade of repairing automobile trucks and had succeeded in unionizing approximately 80% of such employees, as a result of which working conditions were improved, wages increased and hours decreased; that plaintiff conducted a non-union shop and defendants were attempting to unionize plaintiff's employees; that for this purpose they conferred with plaintiff's representatives for the purpose of meeting its employees and to confer

with them; that plaintiff would not give its consent in this respect; that thereupon defendants caused two pickets to be placed in front of plaintiff's premises, one of whom bore a banner bearing on it the words, "Unfair to Auto Mechanics, Local 701, A. F. of L." and the other carried a similar banner bearing on it the words, "Unfair to Teamsters and Chauffeurs Union, Local 713, I. B. of T., A. F. of L." The answer denied any intimidation or violence but averred that the picketing was conducted in a peaceful manner.

While plaintiff's motion for a preliminary injunction was pending this court handed down an opinion in *Swing v. American Federation of Labor, et al.*, 298 Ill. App. 63. A few days thereafter plaintiff, by leave of court, amended its complaint by adding six of its employees as additional parties plaintiff, and shortly thereafter an order was entered granting a temporary injunction as prayed for. Defendants appeal only from that part of the injunctional order by which they were enjoined from peaceful picketing. In this connection counsel for defendants say that "defendants are interested in reversing the temporary injunction only in so far as it restrains defendants from 'peacefully picketing' by displaying a banner on the public highway in front of Hendrickson Motor Truck Co., a corporation's premises," although they say there were other provisions of the order that are "unsound in law and fatally defective."

There seems to have been no dispute between plaintiff and any of its employees, and counsel for plaintiff say that its employees had a union of their own known as "Self-Organization of Hendrickson Motor Truck Co. Employees" of which nearly all of plaintiff's employees were members and that plaintiff had recognized this organization for the purpose of collective bargaining as to the terms and conditions of their employment.

In the *Swing* case (298 Ill. App. 63) in construing the act on injunctions in labor disputes, enacted in 1925, which prohibits the issuance of injunctions in labor disputes in certain cases, we held the act was inapplicable where the relation of employer and employee did not exist. Prior to the enactment of this statute peaceful picketing was unlawful. *Barnes* v. *Typ. Union*, 232 Ill. 424; *Swing* v. *Amer. Fed. of Labor*, 298 Ill. App. 63; *Schuster* v. *Int. Assn. of Machinists*, 293 Ill. App. 177. We issued a certificate of importance in the *Swing* case. After the briefs were filed in the instant case and while the *Swing* case was pending on appeal from this court the Supreme court rendered an opinion in *Meadowmoor Dairies* v. *Drivers Union*, 371 Ill. 377, and held that the Labor-Anti-Injunction Act of 1925 applied only to cases where employees have a dispute with their own employer or in a labor dispute between groups of employees and employers. And at the next term the Supreme court handed down an opinion in the *Swing* case in which the court said: "The first point which they urge, that the Illinois Anti-Injunction act of 1925 prohibits the issuance of injunctions in a case such as this, was fully considered and decided by us in *Meadowmoor Dairies, Inc.* v. *Milk Wagon Drivers' Union of Chicago, No. 753* (No. 24890). The opinion in that case was filed while the present appeal was pending and in it we held the act of 1925 has no application to cases wherein there is no dispute between employer and employee." We might add that we delayed deciding this case until the Supreme court decided the *Swing* case.

We are of opinion that the holding of our Supreme court in the *Meadowmoor Dairies* case is controlling on the matter before us.

The order of the Circuit court appealed from is affirmed.

ORDER AFFIRMED.

MATCHETT, P. J., AND MCSURELY, J., CONCUR.

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